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NO. 527

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

O. C. SMITH, ET AL,

Petitioners,

v.

HUMBLE OIL AND REFINING COMPANY, INC.,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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STATEMENT OF THE CASE

Petitioners statement of the case is substantially correct but for clarity the following facts are set forth in chronological order:

1. In 1934 a judgment in Cause No. 8989 (Consolidated Causes 8689, 8755 and 8989) was entered in the state district court of Rusk County, Texas, under the

terms of which the leasehold title to the property in question was adjudicated to be in Humble Oil & Refining Company, a Texas corporation, and other interests in the land including royalty were adjudicated to be in parties other than the heirs of Harriet Murphy, the alleged predecessor in title of the present Petitioner. This was a "trespass to try title" suit which is a form of action to determine title to land.

2. In 1965 Petitioners, claiming to be heirs at law of Harriet Murphy, filed an Application for Bill of Review in the state district court of Rusk County, Texas, in the same consolidated cause seeking to set aside the judgment rendered in that court in 1934, and affirmatively seeking judgment "adjudging title to the tract of land involved herein be in these applicants".

3. In October, 1968, Petitioners filed this suit in the United States District Court for the Eastern District of Texas, seeking to set aside the same 1934 judgment. (In describing the nature of this suit, Petitioners make two inconsistent statements: (1) on page 8 of Petition for Writ of Certiorari Petitioners state that "the allegations of the complaint ask only for money damages," and (2) on page 5 of Petition for Writ of Certiorari Petitioners state "Plaintiffs asked the United States District Court that the judgment of the District Court of Rusk County in Consolidated Causes Nos. 8689, 8755 and 8989 be set aside, . . .". The statement of Petitioners first quoted above is in error. The prayer of the complaint seeks "judgment to set aside the judgment of the District Court of Rusk County, Texas, in Consolidated Causes Nos. 8689, 8755 and 8989 . . ."[1] Any claim to money dam-

1. Appendix, p. 103.

ages for conversion of the oil, wrongful payment of royalty, etc. would necessarily depend on ownership of the land; and to establish this element of ownership, Petitioners would necessarily have to set aside the state court judgment which adjudicated that ownership to be in others.)

4. Defendant in the case at bar (Respondent herein) timely filed a Motion to Dismiss this action, urging, among other things, that the United States District Court lacked jurisdiction over the subject matter because: (1) there was a prior pending action in the District Court of Rusk County, Texas, seeking the same relief as that sought by the plaintiffs in the United States District Court, to-wit: the setting aside of the 1934 judgment of the District Court of Rusk County, Texas, adjudicating leasehold title to be in Humble Oil & Refining Company, (2) no diversity of citizenship existed as between plaintiffs and defendant in this cause, (3) the complaint failed to state a claim upon which relief could be granted, and (4) the complaint failed to allege any facts which would constitute a violation of Section 1983 of the Civil Rights Act.

5. On January 9, 1969, the court below entered an order of dismissal; the court recognized that the defendant had "alleged several grounds in support of its Motion to Dismiss" but stated as the basis of its holding that the state court had acquired jurisdiction over the res prior to the filing of the action in federal district court, and therefore the federal court was precluded from exercising its jurisdiction over the subject matter in the trespass to try title suit which was a proceeding *quasi in rem*.[2]

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2. Order appears on page 14 et seq. of Petition for Writ of Certiorari.

6. On July 1, 1969 the court below entered a separate order denying Petitioners' motion for new trial, wherein it stated that "in so doing, the court reaffirms the views set forth in the order of dismissal entered in January 9, 1969."[3] While not necessary to its decision, the court further stated that (1) since the [fraudulent] conduct complained of was by a private individual [Humble], there was no action under color of state law and hence no cause of action under the federal Civil Rights Act, and (2) no diversity of citizenship existed to give the court jurisdiction.

7. On page 7 of Petition for Writ of Certiorari Petitioners state that the state court proceeding was dismissed between January 9, 1969 and January 20, 1969. There is no basis in fact or in the record for such a statement. Petitioners made the same statement on page 4 of their brief filed in the United States Court of Appeals, and the error of Petitioners was pointed out on page 13 of Appellee's brief filed in that court. The opinion of the Court of Appeals in this cause again brought this fact to Petitioners' attention in stating that ". . . the record before us is devoid of any evidence that the state suit has in fact been dismissed."[4]

REASONS AND ARGUMENT FOR DENYING THE WRIT

The court below was correct in dismissing the complaint for want of jurisdiction on the ground that there was pending in the state district court a similar

3. Order appears on page 17 et seq. of Petition for Writ of Certiorari.

4. Opinion of United States Court of Appeals for the Fifth Circuit appears on page 10 et seq. of Petition for Writ of Certiorari.

in rem or quasi in rem suit between the same parties, which state court suit had been instituted prior to the filing of this suit in the United States District Court.

On page 2 of their brief Petitioners set forth the three grounds of alleged jurisdiction of the United States District Court. While the record will demonstrate that no one of the three grounds of jurisdiction was a valid basis for the jurisdiction of the United States District Court in this cause, the court dismissed the complaint on an independent ground which did not require it to first determine that each of the three alleged grounds of jurisdiction was invalid. The basis of the action of the United States District Court in dismissing the complaint was not that there did not exist a ground of jurisdiction in the United States District Court *absent the state court action*, but rather that in an *in rem* or *quasi in rem* action the court first acquiring jurisdiction of the res maintains that jurisdiction to the exclusion of another court of concurrent jurisdiction.

The action of the district court dismissing this suit for want of jurisdiction is based upon the following facts and analyses:

(1) The 1934 judgment was rendered in a "trespass to try title" suit; a "trespass to try title" suit in Texas is a form of action to determine title to land;

(2) The judgment rendered by the District Court of Rusk County in 1934 in the trespass to try title suit was a judgment *in rem* or *quasi in rem*, *Buchanan v. Girvin*, 176 S.W.2d 729 (Tex. Sup. Ct., 1944);

(3) In Texas a voidable judgment can be set aside in two ways:

(a) by motion for new trial within the prescribed time limits (the time for filing a motion for new trial has expired thirty years before the filing of the Bill of Review mentioned below); and

(b) by an equitable action in the nature of the Bill of Review. A Bill of Review brought to set aside a judgment *in rem* or *quasi in rem* is itself a proceeding *in rem* or *quasi in rem*. This is true because the court hearing the Bill of Review must do more than set aside the former judgment; it must render a judgment on the merits which in a trespass to try title action is adjudicating the status of the title. If the court finds that the title should be in the party holding it in the original action, the judgment is not overturned but left standing. *Bonner v. Pearson*, 7 S.W.2d 930 (Tex. Civ. App., 1928); *Kelley v. Wright*, 184 S.W.2d 649 (Tex. Civ. App., 1944), affirmed 188 S.W.2d 983 (1945); *McCook v. Amarada Petroleum Corp.*, 73 S.W.2d 914 (Tex. Civ. App., 1934). The holding in said cases is summarized in the following quotations.

> "Ordinarily, a suit brought by bill of review should not be divided and tried in parts, one setting aside the judgment complained of and one on the merits. Every issue arising on the merits should be disposed of on the hearing for relief and the relief prayed for either denied or granted in one proceeding. * * *" 34 Tex. Jur. 2d *Judgments*, §254 (1962).

> "The proper practice in proceedings by bill of review is to determine the entire controversy, both as to excuse for failure to appear at the trial or move for a new trial during the term and as to the alleged meritorious defense or cause of action. The case is not tried piecemeal, but the entire controversy is

heard in one proceeding. And where a jury finding on the issues bearing on excuse for failure to appear at the trial as well as on the alleged meritorious defense or cause of action. In other words, only one trial is to be had in the proceeding, in which the court must try and determine not only the question whether the judgment may be reopened, but also the issues presented in the original action; and an order that merely vacates the former judgment without disposing of the merits of the controversy between the parties is not a final judgment from which an appeal will lie." 22 Tex. Jur. 2d *Equity* §33 (1961).

(4) The state district court acquired jurisdiction of the subject matter involved in this action when the Bill of Review was filed in the state court in 1965. When Petitioners filed this suit in United States District Court in October, 1968, the res was already in the exclusive jurisdiction of the state court.

I.

Petitioners do not dispute the soundness of the rule that "Once a court, state or federal, has assumed jurisdiction of an *in rem* or *quasi in rem* proceeding than that court may exercise its jurisdiction to the exclusion of any other court and the res in question is withdrawn from the jurisdiction of any other court." However, Petitioners contend that the correct application of the rule would restrict the exclusive jurisdiction of the court in which the action was first filed to situations where the "physical possession and custody" of the res is in that court.[5] None of the cases cited by Petitioners supports their position. The authorities, including those cited by Petitioners, uniformly sup-

5. Pages 7 and 8, Petition for Writ of Certiorari.

port the position that the jurisdiction of the court in which the suit is first filed attaches upon the filing of the *in rem* action and that the rule applies whether the possession or control of the res is actual or constructive. In fact when the court's possession or control of realty is involved, there is little practical difference in actual and constructive possession or control.

The rule is clearly set forth in *Kline v. Burke Construction Co.*, 260 U.S. 226, 43 S.Ct. 79, 67 L.Ed. 226 (1922):[6]

> "* * * It is settled that where a Federal court has first acquired jurisdiction of the subject-matter of a cause, it may enjoin the parties from proceeding in a state court of concurrent jurisdiction where the effect of the action would be to defeat or impair the jurisdiction of the Federal court. Where the action, is in rem, the effect is to draw to the Federal court the possession or control, *actual or potential,* of the res; and the exercise by the state court of jurisdiction over the same res necessarily impairs, and may defeat, the jurisdiction of the Federal court, already attached. The converse of the rule is equally true,—that where the jurisdiction of the state court has first attached, the Federal court is precluded from exercising its jurisdiction over the same res to defeat or impair the state court's jurisdiction."
>
> * * *
>
> "It is settled that when a state court and a court of the United States may each take jurisdiction of a matter, the tribunal whose jurisdiction first attaches holds it, to the exclusion of the other, until its duty

6. On page 7 of Petition for Writ of Certiorari Petitioners cite this case as authority for the rule that actual physical possession and custody of the res in the court where suit is first filed is required before exclusive jurisdiction attaches. The holding is to the contrary.

> is fully performed, and the jurisdiction involved is exhausted. . . . The rule is not only one of comity, to prevent unseemly conflicts between courts whose jurisdiction embraces the same subject and persons, but between state courts and those of the United States it is something more. 'It is a principle of right and law, and therefore of necessity. It leaves nothing to discretion or mere convenience.' Covell v. Heyman, 111 U.S. 176, 28 L.Ed. 390, 4 Sup. Ct. Rep. 355. The rule is not limited to cases where property has *actually* been seized under judicial process before a second suit is instituted in another court, but it applies as well where suits are brought to enforce liens against specific property, to marshal assets, administer trusts, or liquidate insolvent estates, and in all suits of a like nature."[7]

In *Lewis v. Pitts,* 275 S.W. 473 (Tex. Civ. App., Waco, 1925, writ dism'd) plaintiffs brought a trespass to try title action against defendants in the District Court of Johnson County. Defendants filed a cross action and subsequently filed suit against plaintiffs in the United States District Court for the Northern District of Texas, which suit contained the same allegations as defendants' cross action. Defendants then filed a plea in abatement in the state court proceedings; the state trial judge overruled this plea and rendered a judgment for plaintiffs. On appeal to the Waco Court of Civil Appeals, the defendants contended the trial court erred in not granting their plea in abatement. In affirming the trial court's action, the appellate court stated the following:

> "A suit to determine title to real estate and to establish such title by judgment has been held by our Supreme Court to be a proceeding in rem. Hardy

7. Emphasis in this brief supplied unless otherwise stated.

v. Beaty, 84 Tex. 562, 568, 569, 19 S.W. 778, 31 Am. St. R. 80. Subsequent to such holding of the Supreme Court, the Legislature of this state enacted a law providing that an action may be brought and prosecuted to final judgment by any person claiming a right to or interest in any property situated in this state, against any person or persons who are nonresidents of this state, and who claim an adverse interest therein; that citation may be made by publication; and that the judgment rendered in such action shall be binding on the parties thereto. R.S. arts. 2172 to 2177, inclusive. No form of seizure of such property by any process of court is required by the terms of said law, and the same is therefore in effect a legislative declaration that litigation over the title to property situated in this state is a proceeding in rem without actual seizure thereof, and that the jurisdiction of the court over such property attaches when suit is filed and an issue of title raised by the pleadings therein. We do not attach any importance to the fact that since the institution of this suit certain parties have been eliminated and possibly a party added. Since the filing of appellees' cross action at the beginning of this litigation, this suit has involved an issue of title to an undivided interest in the land in question asserted by appellees, and which interest they sought to have established by judgment of the court in this cause. This interest is denied in part by appellants. When a proceeding is in rem and the jurisdiction of a state court has actually attached, a federal court will not exercise its jurisdiction over the same property to defeat or impair the jurisdiction of the state court. The jurisdiction of the district court of Johnson County attached before the filing of the suit in the federal court at Dallas. Kline v. Burke Const. Co., 260 U.S. 226, 43 S.Ct. 79, 81, 67 L.Ed. 226, 24 A.L.R. 1077; Lewis v. Schrader (D.C.) 287 F. 893, 895, par. 2. See also I. & G.N.R. Co. v. Barton, 24 Tex. Civ. App. 122, 57 S.W. 292. Such

jurisdiction was not defeated because appellants asked for more extended relief in their suit subsequently filed in the federal court."

Prudential Insurance Co. v. Zimmerer, 66 F. Supp. 492 (D. Neb., 1946) involves facts similar to the case at bar, although the sequence of actions brought in that case is somewhat reversed. In *Zimmerer* the plaintiff originally brought suit to foreclose a lien on certain lands in the District Court of Seward County, Nebraska, which court ordered the foreclosure. Subsequently the plaintiff brought an action to quiet title against the defendants in federal court in Nebraska. While this action was pending, the defendants brought a suit in the Seward County District Court to vacate and avoid the judgment in the original foreclosure case (such an action in Texas would be a Bill of Review), and filed a motion in federal court requesting a stay pending the outcome of the state court litigation. Plaintiff contended that since the action was first filed in the federal court, that court had exclusive jurisdiction and should proceed forthwith. Although the federal court chose to grant the stay so that a matter of state law could be determined, the court reaffirmed the rule that in a proceeding *in rem* or *quasi in rem*, the court first acquiring jurisdiction has exclusive jurisdiction. The court also ruled that the defendants' action to set aside the judgment of foreclosure was a proceeding *in rem*. The following statements of the court are pertinent here:

"The action in this court is one solely in rem. The original foreclosure proceeding was also an action in rem, as is the pending equitable proceeding for the vacation of the decrees in that earlier case. At least for the purpose of this ruling, that characteristic of the present suit is neither nullified nor minimized

by the circumstance that the affected res is not formally reduced to the custody or possession of the court. (Citations)

"No controversy exists between the parties upon a primary rule of jurisdiction and procedure as between state courts and federal courts. Recognizing that a different rule obtains in actions strictly in personam, they agree that when two suits in rem, or quasi in rem, involving the same issue are pending, one in a federal court, the other in a state court, the court which first assumes jurisdiction over the property may maintain and exercise that jurisdiction to final effect and to the exclusion of the other court * * *."

In *Neagle v. Brooks,* 373 F.2d 40 (10th Cir. 1967), plaintiff first brought an action in Ejectment, for Damages, to Quiet Title against defendants in the District Court of Wyandotte County, Kansas. That court sustained defendants' motion to dismiss for failure to state a cause of action. That was a final judgment, but the formal order granting the dismissal was not filed at that time. In due course plaintiff filed both a motion for new trial and a motion to amend the pleading, both of which were denied. Plaintiff then filed her notice of appeal to the Kansas Supreme Court. Plaintiff took no further proceedings in the state court; her next act was to file her Petition in Ejectment and to Quiet Title against the same defendants in the United States District Court for the District of Kansas. The federal court ruled that plaintiff was barred from bringing the suit by *res judicata.* In affirming the decision of the trial court, the Tenth Circuit made the following statements:

"This court need not resolve the dispute as to the effective date of the state court's order sus-

taining the motion to dismiss. At any time prior to the final determination by the state court of appellant's quiet title action, the United States District Court was without concurrent jurisdiction to entertain the second suit involving the same real estate, the res being in Wyandotte County, Kansas, and subject to the exclusive jurisdiction and control of the district court of that county. The state court having first acquired jurisdiction of the res, it was required to hear and determine all the controversies relating to it and the property was thereby withdrawn from all other courts. Until the state court's jurisdiction was terminated, the United States District Court was 'disabled' from exercising any power or jurisdiction over the same real property. The controlling question is the nature and extent of the jurisdiction of the District Court of Wyandotte County, Kansas. The Kansas legislature has specifically created the right to institute an action to determine adverse claims in real property. Actions in ejectment or for the recovery of or to determine adverse claims in real property must be brought in the county in which the real estate is situated. It is thus apparent that jurisdiction over the real property described in appellant's petition was vested in the district court of Wyandotte County, Kansas. Jurisdiction of that court over the real property attached when appellant filed her original petition to acquire title to and possession of the property. This is purely an in rem action and is subject to the rule expressed in Princess Lida of Thurn and Taxis et al. v. Thompson et al., Trustees, 305 U.S. 456, 466, 59 S.Ct. 275, 280, 83 L.Ed. 285 (1939), as follows:

> '* * * if the two suits are in rem, or quasi in rem, so that the court, or its officer, has possession or must have control of the property which is the subject of the litigation in order to proceed with the cause and grant the relief sought the juris-

diction of the one court must yield to that of the other. We have said that the principle applicable to both federal and state courts that the court first assuming jurisdiction over property may maintain and exercise that jurisdiction to the exclusion of the other, *is not restricted to cases where property has been actually seized* under judicial process before a second suit is instituted, but applies as well where suits are brought to marshal assets, administer trusts, or liquidate estates, and in suits of a similar nature where, to give effect to its jurisdiction, the court must control the property. The doctrine is necessary to the harmonious cooperation of federal and state tribunals. * * *

"So long as appellant's suit was pending in the state court its jurisdiction was exclusive and the United States District Court was without jurisdiction to entertain the suit subsequently brought for the same relief. After the state court had fully performed its duties with respect to the parties and had dismissed appellant's quiet title action, appellant had but one remaining alternative, viz., to appeal this final judgment to the Supreme Court of Kansas."

The above cases clearly illustrate the fact that courts have treated title actions (as well as actions to overturn judgments rendered therein) as actions *in rem* or *quasi in rem*, and have consistently applied to them the rule that the first court acquiring jurisdiction of the res maintains exclusive jurisdiction thereof. Hence the federal district court was correct in dismissing the complaint because of the prior action pending in the District Court of Rusk County, Texas.

II.

In their second specification of error set forth under "Reasons For Granting Writ of Certiorari."[8] Petitioners contend:

> "The court further erred because the plaintiffs are clearly entitled under the law of the Federal Judiciary, to come into the Federal Court to set aside a State judgment based on fraud."

Petitioners are confusing jurisdiction over the subject matter with the court's *power* to render a decision once the requisite jurisdiction over the subject matter is established. A federal court does not have jurisdiction over the subject matter merely because the suit is one seeking equitable relief to set aside a state court judgment fraudulently obtained. While a federal court has the power under certain circumstances to grant relief to a party who has been deprived of his rights by a judgment fraudulently obtained against him in a state court, it can do so only when it has jurisdiction of the subject matter and parties, e.g., where there is diversity of citizenship and jurisdictional amount or a question of federal law involved. However, the court below correctly held that it had no jurisdiction of this suit.

No Diversity of Citizenship

While the complaint in the district court alleged jurisdiction based on diversity of citizenship, Petitioners do not contend before this Honorable Court that there was in fact diversity of citizenship in this cause. Petitioners do not challenge, as indeed they cannot, the finding of the

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8. Page 5, Petition for Writ of Certiorari.

trial court in its order overruling motion for new trial on July 1, 1969, that the requisite diversity was lacking because the "complaint alleges that the defendant is a resident of the State of Texas, and it appears that the majority of the plaintiffs are citizens of the State of Texas."

III.

> Petitioners contend next that the court below had jurisdiction of this cause because the complaint alleged "a deprivation of Petitioners' rights and privileges *under color of State law* as a result of the entertaining of the judgment of the State Court on behalf of Humble Oil and Refining Company in 1934, in violation of Section 1983, Title 42, U.S. Code."[9]

It has heretofore been shown that the court below lacked jurisdiction over the subject matter of this cause because of the prior pending action in the state court in this *in rem* or *quasi in rem* suit. While it is Respondent's contention that the trial court's dismissal of this case for lack of jurisdiction was based upon the prior pending action in the state court, the trial court could just as well have dismissed the suit for failure to state a claim upon which relief could be granted; i.e., that there was no jurisdiction over the subject matter because no facts were alleged which would constitute a violation of Section 1983, Title 42, U.S. Code, that being the only other ground of jurisdiction alleged by Petitioners.

Title 42 U.S.C.A. Section 1983 provides as follows:

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9. Page 7, Petition for Writ of Certiorari.

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

The above statute does not expressly confer original jurisdiction on the federal district courts; this is done by Title 28 U.S.C.A. Section 1343, which states in part as follows:

> "The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:"
>
> * * *
>
> "(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;"
>
> * * *

Section 1983 expressly requires that in order to create civil liability the deprivation must be under color of state statute, ordinance, regulation, custom, or usage, i.e., "under color of State law."

The United States Supreme Court has frequently been called upon to interpret the phrase "under color of State law." In *United States v. Classic*, 313 U.S. 299. 61 S.Ct. 1031, 85 L.Ed. 1368 (1941), the court held that:

> "Misuses of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law."

In the *Classic* case the court was construing Section 20 of the Criminal Code, then 18 U.S.C. 52, now 18 U.S.C. 242. That section provides a criminal punishment for anyone who "under color of any law, statute, ordinance, regulation, or custom" subjects any inhabitant of a state to the deprivation of "any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States."

The definition of "under color of state law," as set forth in *Classic*, supra, was reaffirmed by the Supreme Court in *Screws v. United States*, 325 U.S. 91, 65 S.Ct. 1031, 89 L.Ed. 1495 (1945), and *Monroe v. Pape*, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961). In the latter case, the court in construing Section 1983 stated:

> "We conclude that the meaning given 'under color of' law in the Classic case and in the Screws and Williams cases was the correct one; and we adhere to it."

The first requirement for jurisdiction under Section 1983 is that *the person being sued* must have been acting under color of state law. *Pritt v. Johnson*, 264 . Supp. 167, N.D. Pa. (1967). In order to state a cause of action under Section 1983 there must be *more than the deprivation of the rights of one individual by another;* the acts complained of must be action "under color of state law". In order for there to be action "under color of state law," the defendant must either be a state official, or acting

in concert or conspiracy with a state official. In *Walker v. Bank of America National Trust & Savings Assn.*, 268 F.2d 16 (9th Cir. 1959) cert. denied 361 U.S. 903, 80 S.Ct. 211, 4 L.Ed.2d 158 (1960), the plaintiff sued her employer, alleging, *inter alia,* that the employer fraudulently failed to disclose to her that she was eligible for workmen's compensation benefits under state law. She sought to maintain jurisdiction in federal district court under 28 U.S.C.A. 1343 and 42 U.S.C.A. 1983. In affirming the action of the district court in dismissing for lack of jurisdiction, the court stated the following:

> "A person does not act under color of state law unless he acts, or purports to act, on behalf of the state as a state official, or in conspiracy with a person so acting."

To the same effect see *Schatte v. International Alliance, Etc.*, 182 F.2d 158, 167 (9th Cir. 1950), cert. denied, 340 U.S. 827, 71 S.Ct. 64, 95 L.Ed. 643.

The court in *Jobson v. Henne,* 355 F.2d 129 (2nd Cir. 1966), was confronted with the question of whether or not official immunity should be extended to certain state hospital officials who were being sued for allegedly violating the civil rights of the plaintiff. In denying immunity to these officials, the court made the following statement:

> "In suits brought under Section 1983 an indispensable element of a plaintiff's case is a showing that the defendant (or defendants) acted 'under color of any statute, ordinance, regulation, custom, or usage of any state * * *.' 42 U.S.C. §1983. This test can *rarely be satisfied in the case of anyone other than a state official.*"

Participation in a state court proceeding between private litigants, either as a judge, attorney or party, has frequently been held not to be "action under color of state law." In *Bottone v. Lindsley,* 170 F.2d 705 (10th Cir. 1948), cert. denied 336 U.S. 705, 69 S.Ct. 810, 93 L.Ed. 1101, plaintiff brought a damage suit under Section 43, Title 8, U.S.C.A. (now 42 U.S.C.A. 1983) against the parties, lawyers, and judge who had participated in a state court proceeding instituted by plaintiff. The court states:

> "We seriously doubt whether lawyers who invoke the jurisdiction of a state court for the purpose of prosecuting a claim against a private individual, are state functionaries acting under color of state law within the meaning of Section 43. It may also be doubted whether a judge, acting in his official capacity, even in concert with officers of his court, act under color of state law in the trial of a case between private parties. *In private litigation, the state merely furnishes the forum and has no interest one way or the other in the outcome.* Cf. United States v. Classic, supra; Screws v. United States, supra; Lane v. Wilson, 307 U.S. 268, 59 S.Ct. 872, 82 L.Ed. 1281; Picking v. Pennsylvania R. Co., supra; Mitchell v. Greenough, supra. Sections 43 and 47 do not have the effect of taking into federal control the protection of private rights against invasion by individuals. Hodges v. United States, 203 U.S. 1, 27 S.Ct. 6, 51 L.Ed. 65; Logan v. United States, 144 U.S. 263, 12 S.Ct. 617, 36 L.Ed. 429; Love v. Chandler, 8 Cir., 124 F.2d 785."

In *Skolnick v. Spolar,* 317 F.2d 857 (7th Cir. 1963), cert. denied 375 U.S. 904, 84 S.Ct. 195, 11 L.Ed.2d 145, plaintiff originally brought suit in Illinois state court al-

leging that certain stockbrokers had mishandled his account. The case was tried and resulted in a jury disagreement. Plaintiff then sued the stockbrokers, their attorneys in the state court proceeding, and the court bailiff, claiming that his civil rights had been violated. Since diversity of citizenship was lacking, plaintiff sought to invoke jurisdiction under the Civil Rights Acts and 28 U.S.C.A. 1343. The acts complained of arose during the trial in the state court. The complaints essentially were that the bailiff made defamatory statements about plaintiff in front of the jurors and that the attorneys excused a prospective Negro juror. In affirming the dismissal, the court said:

> "This was a state court action between private parties in which the state merely furnished the forum and in which it had no interest. Those who are alleged to have conspired cannot be said to have been acting under color of state law within the meaning of the Federal Civil Rights Act."
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> "The abuses of which plaintiff complains arise out of private rights and rights conferred by state law. . . . Mere errors or irregularities in state court proceedings are not sufficient to show a purposeful conspiracy to deny plaintiffs due process. * * *
>
> "The Federal courts do not guarantee a citizen against the loss of a private civil action due to alleged irregularities in the trial thereof in a state court."

The companion case, *Skolnick v. Martin*, 317 F.2d 855 (7th Cir. 1963), cert. denied 375 U.S. 908, 84 S.Ct. 199, 11 L.Ed.2d 146, in which the same plaintiff claimed that the defendant's lawyer violated his civil rights while taking his deposition in the state court proceeding, held that:

> "We have found no case, and none has been cited to us, holding that Federal courts may, under the Federal Civil Rights Acts, review or supervise civil proceedings in a state court between private parties. On the other hand, the authorities thus far have held to the contrary."

In *Swift v. Fourth National Bank of Columbus, Georgia,* 205 F. Supp. 563 (N.D. Ga. 1962), plaintiffs sued a national bank, its officers and attorneys, claiming that their civil rights had been violated and asserting federal jurisdiction under Section 1983. In dismissing the complaint for lack of jurisdiction over the subject matter the court said:

> "It is apparent from the complaint that the Plaintiffs, or some of them, have been parties to state court litigation with results considered by them to be unsatisfactory, but it cannot be seriously contended that the lawyers who participated in the trial of these matters, nor the judges who presided over the proceedings in the State Court, are state functionaries acting under color of state law within the meaning of the Civil Rights Acts: This was private litigation and the state merely furnished the forum and had no interest one way or another in the outcome."

For cases of like effect see *Pugliano v. Staziak,* 231 F. Supp. 347 (W.D. Penn. 1964), affirmed *per curiam* 345 F.2d 797, *Winkler v. Pringle,* 214 F.Supp. 125 (W.D. Penn. 1963), affirmed 324 F.2d 613, cert. denied 377 U.S. 908, 84 S.Ct. 1169, 12 L.Ed.2d 178, *Kregger v. Posner,* 248 F. Supp. 804 (C.E.D. Mich. 1966), and *Haldane v. Chagnon,* 345 F.2d 601 (9th Cir. 1965).

In *Dinwiddie v. Brown,* 230 F.2d 465 (5th Cir. 1959), cert. denied 351 U.S. 971, 76 S.Ct. 1041, 100 L.Ed.

1490, the court held that a private litigant who instituted a trespass to try title suit in state court was not acting under color of state law. In the *Dinwiddie* case the plaintiff alleged that she had bought and resided on property in Wichita Falls, Texas; that the defendant Brown brought a trespass to try title suit against her in state court; that judgment was entered for Brown; that service of process in the state suit was made through the office of the sheriff of Wichita County, defendant Bailey; and the writ of possession issued after final judgment was executed by a deputy of defendant Constable Elder. Plaintiff Dinwiddie sued Brown, Bailey, and Elder, and others, alleging that they had conspired to deprive her of her civil rights in violation of Section 1983. The district court dismissed the complaint and the plaintiff appealed. The hearing on appeal was consolidated with another similar case. In affirming the dismissal, this court held as follows:

> "This is not to deny that if state officers *conspire* with private individuals in such a way as to defeat or prejudice a litigant's rights in state court, that would amount to a denial of equal protection of the laws by persons acting under color of state law. It is another matter, however, where they act wholly within their official responsibilities and do not intentionally cooperate in any fraudulent scheme. In such a case, the tort is solely that of the private individuals, and redress of the wrong rests with the state courts. Collins v. Hardyman, 341 U.S. 651, 71 S.Ct. 937, 95 L.Ed. 1253.
>
> *"Here the only defendants who acted under color of state law were the state officers who issued process and levied execution in the Dinwiddie case,* and we may presume for the sake of argument did the same in the Roark case. Although both complaints alleged

generally that all the defendants conspired to deprive the respective plaintiffs of the equal protection of the laws, there is no allegation that the state officers named therein acted to the plaintiffs' damage in any manner other than in the ordinary performance of their duties. Merely characterizing their conduct as conspiratorial or unlawful does not set out allegations upon which relief can be granted. Snowden v. Hughes, 321 U.S. 1, 8, 64 S.Ct. 397, 88 L.Ed. 497; McGuire v. Todd, 5th Cir., 198 F.2d 60; Morgan v. Sylvester, D.C.S.D.N.Y., 125 F. Supp. 380.

"Stripping the complaints of this verbiage, there is left, at most, only the allegation of the *obtaining* of a *fraudulent judgment* by private individuals, and the completely extraneous allegation that Texas' segregation laws operate to deprive these plaintiffs of their constitutional rights. The two real property actions in question here had no connection with the enforcement of such laws. Likewise the allegation that as a result of these laws an attitude of white supremacy is fostered, tending to degrade the Negro and make his oath worthless in state court, is totally beside the point because there is no allegation that any Negroes testified in the state actions, on either side, or even that these plaintiffs were in any way prejudiced in these particular actions because of their race. Rather, *the allegations appear to have been inserted in each complaint merely to give a state cause of action the appearance of a suit under the civil rights acts. The circumstance that the parties were of different races could not, of course, operate to convert these torts into federal causes of action.*"

The facts of the *Dinwiddie* case are similar to the case at bar, and the court clearly held that the only defendants acting under color of state law were the state officers. In a case decided subsequent to the *Dinwiddie* case,

Hanna v. Home Insurance Co., 281 F.2d 298 (5th Cir. 1960), cert. denied, 365 U.S. 838, 81 S.Ct. 751, 5 L.Ed. 2d 747, the court affirmed its holding that participation by a party in a state court proceeding is not action under color of state law. In the *Hanna* case the defendant Home Insurance Company had been sued by the plaintiff in a prior state court proceeding. In affirming the lower court's dismissal for lack of jurisdiction, the court made the following pertinent comments:

> "Section 1983 affords a civil action for damages against a person who, *acting under color of state law*, deprives another of any rights, privileges, or immunities secured by the Constitution and laws. In this case, Hanna asserts his cause of action for damages against Home Insurance Company *only*. It is clear that Home Insurance Company was not acting under color of state law; Section 1983, therefore, is inapplicable. . . ."

Therefore, conceding for the sake of argument the correctness of Petitioners' allegations that they were prevented from making a good defense in the state court action by reason of fraud of Respondent, the court below correctly set forth the law in its order overruling motion for new trial when it stated: "Since the conduct complained of was by a private individual and not under color of state law, no cause of action has been stated under the federal Civil Rights Act." The cases cited under this point are authority for the principle that the very fact that a state furnishes a forum for private litigants to settle their disputes is not "state action" which will give the federal district court jurisdiction under Section 1983, Title 42 U.S. Code.

CONCLUSION

This Respondent concludes as follows:

1. The Trial Court properly dismissed the complaint for want of jurisdiction because there was a prior pending action in the state district court seeking the same relief.

2. The Trial Court lacked jurisdiction over the subject matter because the complaint failed to state a claim for violation of Section 1983, Title 42, U.S. Code.

3. The mere fact that Petitioners' suit was to set aside a state court judgment procured through the allegedly fraudulent conduct of Respondent did not give the United States District Court original jurisdiction of the claim.

4. The complaint establishes that there was no diversity of citizenship.

PRAYER

Respondent respectfully prays that the Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

By _____
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CERTIFICATE OF SERVICE

Two copies of the above and foregoing Brief for Respondent in Opposition to Petition for a Writ of Certiorari were on September 11, 1970, mailed to Honorable Leighton Cornett, 50 North Main Street, Paris, Texas, attorney of record for Petitioners.

DILLARD BAKER